IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 109.
Federal Power Commission et al.
vs.
Interstate Natural Gas Company, Incorporated, et al.

No. 188.
Public Service Commission of the State of Missouri
vs.
Interstate Natural Gas Company, Incorporated, et al.

No. 209.
Memphis Light, Gas and Water Division
vs.
Interstate Natural Gas Company, Incorporated, et al.

No. 212.
Illinois Commerce Commission
vs.
Interstate Natural Gas Company, Incorporated, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR SOUTHERN NATURAL GAS COMPANY, RESPONDENT.

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INDEX.

	Page
Opinion below	1
Jurisdiction	2
Statement and summary of argument for Southern Natural Gas Company	2
Argument	14
The Central States Case neither originated nor compelled the application of any rule which should be reviewed or modified	14
The extreme ultimate consumer consequences which Petitioner seeks to attach to its rate orders is not warranted under the Natural Gas Act and is not sustained by the decisions	16
I. Southern Natural holds a vested right independently of the stay order or the fund to recover from Interstate the full amount of the overcharges illegally exacted, with interest	19
I-A. The Natural Gas Act affirmatively, and as a matter of constitutional necessity, excludes ultimate consumers from its formula for regulation and confirms its mechanism entirely to the relation between pipelines and utilities. Similarities and distinctions between the Natural Gas Act and the Interstate Commerce Act are organic and informative	22
II. Southern Natural's independent right to restitution of the overcharges illegally exacted under protection of the stay order is not limited to or by the terms or security provided by that order or to any discretion held by the Court as to the distribution of the stay fund	25
III. Petitioner erroneously maintains that in order for Southern Natural to qualify for distribution from the stay fund it must meet the burden of proving that Southern Natural has not passed on the overcharge to others, precisely as if a statute had been	

enacted equivalent to the provision to that effect adopted as a condition to the recovery of the AAA taxes declared illegal 29

IV. Petitioner erroneously maintains that there is of record or in the proceedings before Federal Power Commission some basis for an assumption that Southern Natural could have retained no part of the benefit of the gross rate reduction suspended by the stay order had it not been suspended or the assumption that it would have passed through to ultimate consumers. The presumption would be contrary to the public interest in the administration of the Natural Gas Act 32

V. Petitioner's contention that Southern Natural earned without respect to the rate reduction during the entire period of the stay the maximum amount which would have been permitted in a rate hearing is not only an unwarranted assumption in gross (supra), but ignores the fact that Southern Natural sold a large volume of gas to industries for consumption at private contract rates not subject to regulation or control by Federal Power Commission or any State authority and known generally to reflect a low margin of return..... 36

VI. The proposal of Petitioner that the Court submit the question of fair return to Southern Natural for the period 1943-1947 for advisory opinion by the Federal Power Commission or State Commissions is untenable, for lack of authority in such agencies and because of the total inaptness of the proposal to graft that mechanism on the courts of appeal..... 37

VII. The contention by Petitioner for distribution of the stay fund to ultimate consumers by-passes the downstream distributors and municipalities which purchase gas from Southern Natural and is based upon a wholly unwarranted assumption that these distributors would have been compelled to pass the full reduction on to consumers, if it had been compulsorily made available by Southern Natural to the Distributors 39

VIII. The average overcharge proposed to be allocated from the fund to commercial and domestic consumers in Southern Natural's area amounts to $2 per customer for the entire 4½ years or at the average rate of 47¢ a year per customer. That result is inadequate to warrant consideration being given to the overruling of established precedents and the imposition on the courts of appeal of the rigid rule sought by Petitioner. No distributor, State authority or consumer in Southern Natural's area has responded to Petitioner's invitation to participate in this proceeding for any such minimal result..... 41

IX. The mechanical and administrative functions involved in the insistence of Petitioner are inconsistent with the jurisdiction and unsuited to the organization and functions of the courts of appeal. The history of refunds in similar cases made pursuant to consent demonstrates the lack of judicial standards, the complexity and the burden upon the organization and functions of the Court which would result from the adoption of the rule proposed by Petitioner 42

X. The functions proposed by Petitioner are those of rate making in violation of the basis of and undeviating adherence to the doctrine of primary jurisdiction 46

XI. Inasmuch as the right of Southern Natural to restitution from Interstate is incontestable for the lack of any offsetting equity as between Interstate and Petitioner, the proposal of Petitioner for distribution to ultimate consumers having a molecular interest in the fund would expose Interstate to a heavy penalty of which it was not adequately apprised by the terms of the stay order..... 47

Conclusion 48

Appendix 49

Analysis of the Natural Gas Pipeline Refund..... 49

The Panhandle Eastern Fund (Eighth Circuit)..... 52

Opinion authorizing order entered October 8, 1946.. 54

Cases Cited.

Adams v. Mills, 286 U. S. 397 20
Anniston Mfg. Co. v. Davis, 301 U. S. 337 ..... 6, 29, 30
Arkadelphia Mill Co. v. St. Louis S. W. R. Co., 249 U. S. 134 20
Ashland Coal & Ice Co. v. United States (1945), 61 Fed. Supp. 708, 713 34
Atlantic Coast Line v. Florida, 295 U. S. 301 21

Board of Trade v. United States (1942), 314 U. S. 534, 546 ..... 34, 35
Brashear Freight Lines v. Comm., 41 Fed. Supp. 952 28

Central Kentucky Nat. Gas Co. v. R. R. Comm., 290 U. S. 264 18
Central States Electric Company v. City of Muscatine, 324 U. S. 134 ..... 2, 5, 10, 19, 45

Federal Power Comm. v. Hope Natural Gas Co., 320 U. S. 591, 610 ..... 17, 23, 24
Federal Power Comm. v. Natural Gas Pipeline Co., 315 U. S. 575, 598 20

Georgia v. Pennsylvania R. R. Co. (1945), 324 U. S. 439, 460-461 35
Greenwood County v. Duke Power Co., 147 Fed. (2) 246 ..... 21, 26, 44

I. C. C. v. Union Pacific R. R. (1912), 222 U. S. 541, 550 34
Illinois-Natural Gas Pipeline Case, 141 Fed. (2d), at p. 30 38
Inland Steel Co. v. U. S., 306 U. S. 153 ..... 4, 10, 16

Lake Shore & M. S. Railway v. Smith (1899), 173 U. S. 684, 698 35

Natural Gas Pipeline Co. v. F. P. C., 131 Fed. (2) 137 37
Newton v. Consolidated Gas Co., 258 U. S. 165 18
New York v. United States (1947), 331 U. S. 284, 344, 345 35

Panhandle Eastern v. Fed. Power Comm., 324 U. S. 635 (143 Fed. [2d] 488) 45

Portland Ry. L. & P. Co. v. R. R. Comm. (1913), 229 U. S. 397, 410 35
Public Serv. Com. v. Brashear Lines, 312 U. S. 621, at p. 629 4

Russell v. Farley, 105 U. S. 433, 444 15

Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531 ..... 10, 19, 24, 29
Springfield Gas & Elec. Co. v. Springfield, 292 Ill. 236, S. C. 257 U. S. 66 ..... 33, 38

Texas & Pacific Ry. Co. v. U. S. (1933), 289 U. S. 627, 636 35

U. S. v. Butler, 297 U. S. 1 30
U. S. v. Chicago, M. St. P. & P. R. Co. (1935), 294 U. S. 499, 506 35
U. S. v. Illinois Cent. R. R. (1924), 263 U. S. 515, 522. 35
U. S. v. Jefferson Electric Co., 291 U. S. 386 ..... 6, 29, 30
U. S. v. Morgan, 307 U. S. 183, 197 ..... 4, 9, 10, 15, 16, 21, 33

Wilson Cypress Co. v. Atlantic R. R. Co., 109 Fed. (2d) 623 21

Textbooks Cited.

Annotation, 131 A. L. R., p. 878 20
18 L. R. A. (N. S.) 124 21
18 A. L. R., p. 946 ..... 33, 38
Sharfman, The Interstate Commerce Commission, Vol. III B, p. 333 et seq. 23, 24, 25

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OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit was filed March 12, 1948 (R. 103), and is reported in 166 F. (2d) 796.

JURISDICTION.

The order of the Court of Appeals was entered May 12, 1948 (R. 109-112). Petitions for writs of certiorari in Nos. 109, 188, 209, and 121 were timely filed and the writs of certiorari were granted on October 11, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

STATEMENT AND SUMMARY OF ARGUMENT FOR SOUTHERN NATURAL GAS COMPANY.

This statement and summary of the argument are set forth under the same section of this brief for the purpose of more clearly supplementing the facts appearing in petitioner's brief, in their relation to the argument and more clearly emphasizing what are deemed to be the inadvertencies or inaccuracies in the statement and contention of petitioner, Federal Power Commission, in No. 109.

The statement for petitioner, as far as it goes, is accurate as to the main procedural steps, but is inaccurate or inadvertent throughout the brief with respect to the bearing of Central States Co. v. City of Muscatine, 324 U. S. 134, both as to the intervention of this respondent and the so-called compulsion of the Central States Case on the Court below.

The intervention of Southern Natural Gas Company (Southern Natural) was not, contrary to the assertion of petitioner, either in terms or in fact in reliance on or dependent upon the Central States case, although in the argument on submission that case was recognized as an appropriate decision for citation as the latest of an established line of authorities sustaining the intervention and the distribution of the fund to the sole parties in privity to the overcharge, who alone paid it under compulsion of the stay order.

Southern Natural's intervention asserted its vested right, independent of the terms of any stay order or any bond taken in the review proceedings, to have restitution from Interstate for illegal overcharges exacted, and expressly disclaimed any limitation of its claim to the terms of the stay order (Intervention, Sec. 6, R. 52), viz.:

> "6. Section 19 (c) of the Natural Gas Act conferred or recognized jurisdiction in this Court to stay enforcement of the Commission's order when Interstate instituted review proceedings in this Court, but no provision of said Natural Gas Act or general power of this Court authorized suspension or impairment of Southern's vested right to refund from Interstate, except as might result from a decree herein modifying or setting aside the Order. The Order has been affirmed in all respects.
>
> "The Order of June 14, 1943, staying enforcement on the conditions stated was entered ex parte and without notice as to Southern. Southern was not a party to the proceedings before the Commission or on review by this Court and Southern should not, as it is advised, by reason of conditions imposed upon Interstate for the stay be held to have waived or transferred its right to final settlement with Interstate on the basis averred herein, that is, by recovery from Interstate in Southern's own sole right to the sum of $688,156.71, with interest from the dates of the respective excess payments."

That intervention (Sec. 7, R. 52) further stated that Interstate has filed its petition (R. 16) for disposition of the fund, requesting and consenting that distribution be made to the pipeline purchasers from Interstate; and Southern Natural taking cognizance both of notice of that motion and in response to the accepted discretionary practice of courts of equity to accept intervention in such matters

intervened in the court below for recovery from Interstate of the overcharge, the right to which was vested in Southern Natural by law, with or without respect to any bond or fund. *Public Serv. Com. v. Brashear Lines*, 312 U. S. 621, at p. 629.

As to the fund, the Court was, of course, under a self imposed duty to make distribution in conformity with "controlling legal principles." *U. S. v. Morgan*, 307 U. S. 183, 197.

Without respect to the fund, "what has been given or paid under the compulsion of a judgment, the Court will restore when its judgment has been set aside." *U. S. v. Morgan*, supra.

By its intervention, Sec. 7, Southern Natural expressly asserts that it invited distribution from the fund only as payment *pro tanto* on Interstate's independent liability for the overcharge unlawfully exacted from Southern Natural.

> 7. By its petition filed herein, verified under date December 16, 1947, Interstate has requested and consented that distribution of the funds remaining deposited in the registry of this Court as a condition to obtaining stay of the Commission's Order be made to Southern and other named pipe line purchasers from Interstate. Southern is, accordingly, entitled to and is willing to accept in its own right such distribution as payment *pro tanto* on the amount due it from Interstate provided the amount be paid to Southern without commitment or prejudice (R. 52).

The contention of Southern Natural was and is that when the stay was dissolved the suspended rates "were then in effect as though the injunction bond had never been granted." *Inland Steel Co. v. U. S.*, 306 U. S. 153.

Certiorari was granted in response to the representation by petitioner that the order for distribution was compelled by the decision in the Central States Case, and in response to the express or implied representation that the Central States case declared a novel or original rule and that the rule was wrong. This respondent considers that the asserted position was inadvertent, that there was no compulsion on the Court below by reason of the Central States decision and that the determination by the Court of Appeals that the fund, under its equitable control, should be paid over to the pipelines, without prejudice to remote rights, presents no basis for reversal.

Petitioner sought and obtained the writ to present the narrow question whether *Central States Electric Company v. City of Muscatine*, 324 U. S. 134, is wrong and should be overruled; and, if not, whether that decision compelled the court below to order distribution of the stay fund to those who, alone, were in privity with the rate and to the illegal overcharge and paid it under compulsion.

The brief for petitioner takes a much wider scope.

To summarize, petitioner in its statement and argument, takes the following main positions, which are considered either unsound or unwarranted on the facts. They will be dealt with in this order under a similar numeration in the argument for Southern Natural.

I. Petitioner ignores Southern Natural's vested cause of action for restitution, independently of the terms of any stay order.

II. Petitioner undertakes to relegate Southern Natural to the sole status of an applicant for distribution from a fund subject to the equitable discretion of the Court on an abstract or non justiciable basis in competition with the ultimate consumer or general public rather than as a con-

templated claimant to a fund set up as security for those who might, as made plain by Sec. 4 of the order, show a justiciable financial interest in the result of the overcharge exacted under protection of the stay order. Petitioner attaches unwarranted significance to the mention of ultimate consumers in the initial order in spite of Sec. 4 (R. 2) and the obligation of the court to follow tangible equities and stop short of distribution to third parties having no remote justiciable relation to the fund.

III. Petitioner undertakes to graft both on the fund and on the vested right of Southern Natural arising out of the Natural Gas Act the conditions, imposed on the right to recover taxes illegally collected under AAA, which were adopted by Congress and discussed in *U. S. v. Jefferson Electric Co.*, 291 U. S. 386, and *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, viz.: the burden of showing that claimant had not included the AAA tax in the price for the commodities sold or had not otherwise shifted the burden of the tax.

IV. Petitioner undertakes to have this Court or this record hold that it must be assumed that Southern Natural, by reason of sundry administrative or voluntary adjustments of its wholesale rate schedules, made during the period 1943-1947, is estopped from contending that in a "fair return" hearing Southern Natural could have retained any part whatever of the overcharge paid to Interstate. In short, that its net income from its regulated business during that period must be conclusively presumed to have been not only the maximum for which it could have asserted constitutional protection, but that any further return would also have been excluded from the zone of reasonableness above confiscation supposed to be inherent in the administration of the system for the regulation of rates. That zone above confiscation is deemed essential not only to practical administration of rate regulation, but

to judicial review, and to the survival of any system under private ownership essential to the public welfare and dependent for continual expansion on investment by the public.

The overcharges paid into the fund allocated to Southern Natural's purchase from Interstate and resold to distributors over four and a quarter years ($473,521—R. 30) amounts to a fractional percent of Southern Natural's annual operating expenses deductible in determining its net operating income. The petitioner conducted a more or less desultory hearing, interspersed with voluntary changes (domestic use reductions and industrial increases), for nearly three years (Pet. Br., pp. 53-54). This informal procedure was carried on with desirable cooperation, including cooperation between Southern Natural and its vendee distributors and understandings with the Commission, in a genuine and liberal effort to protect all interests and simplify one of the most difficult administrative problems in the American constitutional system, without controversy. For the Commission now to insist that the result must be conclusively presumed to be exact to a fractional percent and to allow for no zone of reasonableness is not only on its face untenable, but does a disservice to the administration of the system and the cooperation the Commission has received in these matters from many pipe line companies, including Southern Natural.

V. Petitioner undertakes to have this Court and the Court below ignore the fact that approximately twenty (20) percent of Southern Natural's sales (R. 30) exclude any possible inquiry into the price or return, since they were direct sales to industry consumers at rates fixed by contract not subject to regulation under the Natural Gas Act or by any state authority, being made to selected private industries under private contracts as to location, interruptibility, take cognizance of highly competitive conditions,

large volume, summer consumption and other factors resulting in extremely low rates, as to which Southern Natural had not assumed or undertaken utility status and as to which Southern Natural's return reflected in any refund from Interstate was and is wholly removed from any concern or authority of any Commission (R. 50):

> "Southern has not assumed utility status nor been held to be a public utility or common carrier under the laws of any state. Its deliveries in interstate commerce to distributors since April 27, 1943, the date of the order hereinafter mentioned, have been at rates directed or approved by the Federal Power Commission, as hereinafter stated. Or otherwise lawfully filed and effective under the Natural Gas Act. Its direct deliveries to consumers, whether interstate or intrastate, have not at any time been subject to the jurisdiction or control of that Commission and have been made under said private contracts and at rates fixed by such contracts over which no public or regulatory authority has claimed or asserted jurisdiction in so far as Southern is concerned. * * * no public or regulatory authority has in fact, up to this time, had jurisdiction or authority to revise such private contract rates either prospectively or retroactively or otherwise to require refunds thereof to be made by Southern to any person."

VI. Petitioner undertakes to have the question of "fair return" for the long past period 1943-1947 now submitted for an advisory opinion by regulatory agencies, a function which was and is alike presently beyond the jurisdiction of Federal Power Commission or any regulatory agency in Southern Natural's area, so far as the stay period is concerned.

Petitioner naively suggests that the Federal Power Commission and the Illinois Commerce Commission

have offered to lend their services to investigate the claims of Interstate's vendees who paid the overcharge (p. 33, footnote). The Federal Power Commission has no jurisdiction for any such academic purpose. If it asserted its jurisdiction not in a *bona fide* or requisite proceeding to determine a fair rate structure in 1949 for future application, but for the ulterior and improper purpose indicated, the action would not only constitute an abuse of function but no such finding in 1949 or 1950 could be related, except by the most arbitrary action, to conditions during the stay period.

In *U. S. v. Morgan*, 307 U. S. 183, relied on by petitioner, the Court found that a proceeding was *currently* pending before the Secretary for the necessary determination of a schedule to replace a schedule illegally declared. That was a proper and not a distorted purpose, which petitioner is asking this Court to sanction.

No commission in any state in Southern Natural's area of distribution has any retroactive functions or any jurisdiction to hold admonitory hearings relating to long past periods, even with respect to pipe lines which have assumed utility status. As shown above, no state commission has asserted any jurisdiction whatever over any phase of the rates of Southern Natural and none could be conceivably induced to undertake the function on which the petitioner predicates its argument that the Court of Appeals should have suspended distribution until admonished by unauthorized hearings by State Commissions.

VII. In its insistence on consumer distribution, petitioner undertakes to ignore the rights, prior to any of ultimate consumers, of distributing companies, subject to state regulation, and municipalities, which purchased gas from Southern Natural on its way down stream. Whatever price for gas for resale was paid to Southern Natural was paid

by these distributors. If Southern Natural and other vendees of Interstate had passed on the burden of the overcharge, they passed it on to the distributing companies, and whether the latter would have had a constitutional right to keep it is a question which would involve un-retroactive and academic rate or fair return hearings for the period June 15, 1943, to September 30, 1947, in the case of Southern Natural alone, and a dozen more in the case of the others; in short, some nineteen futile hearings. In Southern Natural's area no regulatory authority has retroactive jurisdiction.

If, notwithstanding *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, the *Morgan* Case, the *Inland Steel* Case and the *Central States* Case, *infra*, or for any reason the immediate vendees of Interstate were held, after synthetic fair return hearings covering the stay period, to be disqualified from receiving refund of the overcharge, through the fund, it is obvious that the distributors would claim it, precisely as the Memphis Light Gas and Water Division (an unregulated municipal distributor) is claiming it here. No distributor in Southern Natural's area of transmission has waived or indicated any intent to waive any right it might have to the fund. The petitioner seeks to disqualify them with the statement that if they had not during that entire period exhausted their right to demand the full limit of a constitutional return, that is their bad luck. They must be conclusively presumed to have done so. That attitude appears inconsistent with the doctrine of comity and cooperation in a difficult problem, with the impossibility of exactitude, in rate regulation, and with the saving principle of the zone of reasonableness inherent in any workable administration or judicial review of the system.

VIII. According to the table supplied and cited by petitioner (R. 30) the gas sales by Interstate to Southern

Natural which ultimately reached consumers through the nine distributing companies or municipalities resulted in total overcharges of $473,521. This gas was in 1947 (a representative year) distributed to 213,637 residential and 22,175 commercial customers, or a total of 235,812. The average overcharge allocated to this load was, accordingly, $2.00 per customer for the entire four and a quarter years, or at the average rate of 47 cents a year per customer.

This computation gives an undue average to the domestic or non-commercial consumer since a major proportion of this fancied burden would obviously be allocable to the greater average commercial load, which, equally as obviously, would have passed on the negligible overcharge to the general public in prices or, substantially, as a tax deduction, to the Federal Government. That ultimate destination will be a principal beneficiary of the refund to the pipelines ordered in this case.

Computed, however, on a full average basis of 47 cents a year, it would appear that the ultimate consumer would not be paying too great a price for the benefits of a system of constitutional regulation, which can not be both constitutional and instantaneous. Nor does it appear that the total amount of $2.00 per customer is sufficient to warrant the over emphasis with which the Commission insists on overruling established procedure. Not merely overruling it but implementing the change by forcing on the Courts of Appeals a fixed rule for "fair return" hearings; academic and retroactive in character, essentially beyond their own organization and jurisdiction, in the futile effort to determine where the final incidence of an overcharge has come to rest in the well to market process.

It should be noted, as a fact, (a) that in this proceeding no state commission and no municipal or utility distributor which purchased its supply from Southern Natural,

nor any industry customer, responded to petitioner's broadcast to join in the effort to divert this marginal revenue from Southern Natural and (b) that Southern Natural has expended for extensions of plant and capacity, the approximate sums indicated in the margin, a result which could not have been accomplished if its zone of return were restricted to a fractional percent above confiscation.*

The stay order of June 15, 1943 (R. 1) was *ex parte* as to Southern Natural. Neither the Federal Power Commission nor any industry or distributor purchaser, downstream; from Southern Natural nor any representative of ultimate consumers or municipality, sought to commit Southern Natural to the waiver in their favor of its right to collect and retain the overcharge by plenary action or to reduce Southern Natural's vested right to the overcharge to the status of a competitive claimant to the fund. Nor did the order purport to relieve Interstate of its primary obligation (temporarily suspended) to account directly to Southern Natural and other pipeline purchasers for the overcharges paid by them, on termination of the stay.

IX. Whether these hearings (to determine whether refund to the pipeline which paid the overcharge would be a wind-fall which the pipeline could not have retained as within the zone of reasonableness) should be held by the Courts themselves or would be admonitory hearings by State or Federal authorities in judicial extension of their bona fide functions, the result or combination would be equally unsuited to the functions and procedure of the Courts of Appeal.

The history of "ultimate consumer" distributions by consent and of the "abstract equity" determinations as to

* Net property additions: 1945, $2,400,000; 1946, $4,500,000; 1947, $6,100,000; 1948, $17,000,000.

who are eligible in the consent distributions demonstrate that the procedure is unsuited to the functions and organization of the Courts of Appeal, do not justify the reversal of established, orderly precedents and should not be forced on the Courts of Appeal to serve a result which is both of doubtful merit because of inherent speculation as to the final incidence and in all such proceedings to date has proven a matter that is indisputably *de minimis* as to domestic consumers to whom, petitioner insists, the distribution should be inflexibly required.

X. Since the right of Southern Natural to restitution on its vested claim against Interstate is indisputable, without reference to the fund, then if petitioner were sustained as showing that the ultimate consumer has an equitable priority over the pipelines and intermediate distributors not before the Court, *as to the fund*, the question then before the Court of Appeals would be the apparently pressing equity of Interstate to protection against use of the fund to create a double exposure for approximately $2,500,000 and costs of distribution as opposed to the remote equity of the ultimate consumers to a total distribution averaging $2.00 each.

ARGUMENT.

The Central States Case Neither Originated Nor Compelled the Application of Any Rule Which Should Be Reviewed or Modified.

Petitioner's argument is that a new ruling should be laid down by this Court that stay funds required in the case of stay orders granted to originating or up stream pipe lines must, but for extraordinary or unstated circumstances not indicated in the argument, be hereafter impounded for and distributed to ultimate consumers no matter how far removed from privity to the overcharge.

The theory is that distributors and upstream intermediate pipe lines must be conclusively presumed to have received at least the bare return which they could protect against confiscation, either as a result of Commission's orders (State or Federal) or because of a conclusive presumption that they would otherwise have set in pursuit of an increase through the Commissions and the Courts. Petitioner is the last authority which should under our system advance any such contention. Without comity and reasonable consideration and adjustments as between pipelines and distributors and practical compromises by both with or approved by regulatory agencies through informal adjustments stopping short of full or controversial hearings, systems of regulation would be, in the long run, inoperable. Probably ninety percent of the functions of the Commissions are discharged in that manner. The history of all rate controversies and of the natural gas fund controversies in particular demonstrate the cost, lost motion and burden on the judicial process which the Commission's theory of exactitude and rigidity would invite.

The Central States case is not subject to attack, either as an original rule or as a conventional precedent, to

make way for any such rigid, distorted and unrealistic formula as counsel for the petitioner contend.

The Court of Appeals was not deviated from any preferred course by compulsion of the Central States case; nor was it an indispensable citation for that court's discretionary distribution of the fund in a manner that satisfied *pro tanto* the overcharge liability of Interstate to the only parties legally entitled to collect it.

Any other distribution would have exposed Interstate to double liability. Distribution to those down stream would have involved a judicial consideration of the position of intermediate downstream pipelines and ultimate distributors, before indulging the presumption that they also had realized more than they could have protected from confiscation.

The annual and total amount distributable on an ultimate consumer basis was so nominal as to be within the rule of *de minimis*—certainly not substantial enough to the several consumers to warrant exposing Interstate to the liability or, rather, the certainty of having to pay double the amount of the overcharge, plus the large cost of distribution of the fund contemplated by the order (R. 2).

This *casus* presented an unmistakable occasion for the exercise of equitable discretion by the Court of Appeals with which, it is submitted, this court should not interfere. That discretion did not arise out of the Central States case. It was fully recognized as far back as *Russell v. Farley*, 105 U. S. 433, 444, where it was conceded that in the exercise of its discretion over a court created fund the court could modify its terms or return it to the party who paid it.

In requiring the fund the Court entered into no contract or understanding, *U. S. v. Morgan, supra,* as petitioner

urges, merely because "ultimate consumers" were mentioned in the first section; and almost certainly excluded by section 4, which plainly contemplated distribution to claimants having a justiciable financial interest, rather than those who might show up with 700,000 remote and speculative claims, two or three times removed from privity to the overcharge, aggregating an average amount doubtfully sufficient to cover the cost of distribution.

As stated in *U. S. v. Morgan, supra*, in acting to dispose of a fund created in response to the court's order "it must conform to controlling legal principles"; that is, the discretion must be tangible and substantial.

That is all that was done by the Court of Appeals. Its conclusion was not forced by the Central States case. That case is no more apt as a citation than *Inland Steel Co. v. U. S.*, 306 U. S. 153, or *U. S. v. Morgan*, 307 U. S. 183.

The Extreme Ultimate Consumer Consequences Which Petitioner Seeks to Attach to Its Rate Orders Is Not Warranted Under the Natural Gas Act and Is Not Sustained BY THE DECISIONS.

Throughout its brief, petitioner asserts that the objective of the Natural Gas Act was protection of the ultimate consumer. It is to be doubted if any system of regulation could be sustained which did not have as its objective the general public interest, but, as narrowly applied by petitioner to the ultimate consumer, the formula would be violative not only of the Natural Gas Act but of the Federal Constitution. As stated by the Court in the Central States case, at p. 144:

> "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to

the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act, but from the exceptionally explicit legislative record, and from this court's decision."

The rigid formula for which petitioner contends is unmistakably the extension of its jurisdiction and the consequence of its action beyond the Congressional intent, by impressing an impact and rigidity both of its affirmative action and (as here, by presumptions from its non-action) its inaction upon relationships beyond its jurisdiction.

This Court has recognized that no such result is appropriate. See *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591:

"As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions" (p. 612).

"We hardly can assume, in view of the history of the Act and its provisions, that the resales intrastate by the customer companies which distribute the gas to ultimate consumers in Ohio and Pennsylvania are subject to the rate making powers of the Commission" (616).

And with respect to the Commission's findings as to just rates, held not reviewable because of no injury and dependent on action by State Commissions:

"The outcome of those proceedings may turn on factors other than these findings" (p. 619).

There is no substantial distinction between an order of the reviewing court, as a condition to a stay of a FPC rate

order requiring a fund for distribution to ultimate consumers having no privity or proximate relation to the rate and the order of the Court disapproved in *Central Kentucky Nat. Gas Co. v. R. R. Comm.*, 290 U. S. 264, which enjoined the state rates on condition that the gas company make effective a court made schedule, or the order disapproved in *Newton v. Consolidated Gas Co.*, 258 U. S. 165, which directed that the impounded fund be subject to distribution in accordance with a subsequently approved rate beyond the jurisdiction of the court to establish.

This Court has repeatedly warned the lower courts of the caution which should be exercised in prescribing conditions to the injunction of rates. Stone, J., in *Cent. Ky. Co. v. Comm.*, *supra*.

The conditions must not be a substitute for rate findings or rate making, beyond the function of the Court.

So far as this proceeding is concerned, the ultimate consumer, two or three times removed from privity with the only rate and rate function within the jurisdiction of the Federal Power Commission or the Court of Appeals, is indistinguishable legally and economically from the general public in the area.

In the absence of consent there is no more justification for an order of distribution to such ultimate consumers than there would be to an order of distribution to the general public, which, of course, would be a flagrant abuse of judicial discretion.

It may be that if Interstate had, in order to obtain a stay, agreed to a penalty fund for distribution, if the stay were dissolved, to charity or to the municipalities within the ultimate areas of distribution of its gas, it could not complain, but it would be difficult to imagine a more arbitrary exaction. The proposal of counsel for the Commis-

sion on this record is equally incapable of reconciliation with the rules for determining whether a stay should be granted or denied. If the public interest is so definitely threatened by the stay (on a basis not reduced, as here, to *di minimis*) the application for stay should be denied.

I.

Southern Natural Holds a Vested Right Independently of the Stay Order or the Fund to Recover From Interstate the Full Amount of the Overcharges Illegally Exacted, With Interest.

The legal effect of the Natural Gas Act, as construed by approved analogy to the Interstate Commerce Act, is that the rates established pursuant to the Act are the lawful rates which must be applied in settlements for sales of gas subject to the Act; and that refunds of overcharges are payable to the purchaser or shipper who paid them, without respect to the question whether the purchaser or shipper has passed or can pass the final incidence of the overcharge, downstream, to successive pipe lines, distributors, wholesalers, ultimate consumers or the general public.

Central States Electric Co. v. Muscatine, 324 U. S. 138;

Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, per Holmes, J., approving the Commission's comment on "the endlessness and futility of the effort to follow every transaction to its ultimate result" and holding that privity to a rate is essential to right of action for restitution, observing:

> "Probably in the end, the public pays the damages in most cases of compensated torts." P. 534.

Adams v. Mills, 286 U. S. 397, per Brandeis, J.:

> "In contemplation of law the claim for damages arose at the time the extra charge was paid. . . . No useful end would be served by requiring the joining of 174,000 shippers in this proceeding."

Sec. 4 (a) of the Natural Gas Act (15 U. S. C., Sec. 717 [d]) makes unlawful the collection of any amount in excess of the rate ordered by the Federal Power Commission. Such overcharges are denounced as "illegal exactions."

Federal Power Comm'r v. Natural Gas Pipeline Co., 315 U. S. 575, 598.

Southern Natural has accordingly a vested and plenary right to recover the overcharge from Interstate, in its own right, independently of and not arising out of or limited by any bond or fund or *ex parte* order of the Court for stay purposes and wholly without respect to the question whether Southern Natural has or has not passed on the burden imposed by the stay, a right which may be asserted on intervention in the injunction proceeding.

Arkadelphia Mill Co. v. St. Louis S. W. R. Co., 249 U. S. 134;
Annotation, 131 A. L. R., p. 878.

Southern Natural's right to recover from Interstate remained plenary and independent regardless of the nature of the conditions imposed on Interstate for the stay or the class of persons, including Southern Natural, for whose security or benefit the conditions were imposed, primarily those having a financial interest in the fund (R. p. 2, sec. 4).

Authorities, *supra*.

To establish a common-law right to recover an overcharge, a showing of economic compulsion may be neces-

sary, but no such showing or condition is necessary to maintain an action for recovery of an overcharge declared illegal, as here, by statute. However, in this case Southern Natural Gas Company was under compulsion to take gas from Interstate at the excess rate in order to protect its supply contracts from termination, thus meeting the test of compulsion under common law requirements.

18 L. R. A. (n. s.) 124.

The order of the Commission became not only the legal rate for settlement between Interstate and Southern Natural, but it became the final rate, not subject to reversal and reparation as excessive, unreasonable or extortionate as in the case of legally effective transportation rates subject to the Interstate Commerce Act which remain subject to reconsideration by the Interstate Commerce Commission.

No subsequent hearing or proceeding whatever (other than review by the Court of Appeals of the validity of the order of Federal Power Commission) could possibly displace the obligation of Interstate to settle with Southern Natural (not the Court) for gas purchased by Southern Natural, on the basis of the affirmed rate.

It is conceded that an action for restitution, whether maintained independently or entertained in the injunction proceeding responsible for the exaction of the overcharge, is in the nature of an action assumpsit or for money had and received in which traditional equities, as between the party who exacted and the privy who paid the overcharge, are considered. *Wilson Cypress Co. v. Atlantic R. R. Co.*, 109 Fed. (2d) 623; *U. S. v. Morgan, supra; Atlantic Coast Line v. Florida*, 295 U. S. 301; *Greenwood County v. Duke Power Co.*, 147 Fed. (2d) 246.

In this matter, as between Interstate and Southern Natural, there is no conceivable equity which Interstate could

oppose to its liability for restitution, without respect to the *ex parte* conditions to which it agreed on obtaining the stay.

Interstate could, of course, obtain no credit from Southern Natural against the overcharge for having set up a security or secondary fund or obligation, except to the extent that Southern Natural might receive it.

Moreover, in this proceeding the request by Interstate (R. 16-19) for distribution of the fund to the pipeline companies which paid the overcharge acknowledges their right to distribution, upon which Interstate asked to be absolved from further liability with respect to the fund.

For these reasons, the basic right of Southern Natural to restitution from Interstate is acknowledged, final and incontestable, as between themselves, and without credit or off-set for any payment out of the fund unless and until Southern Natural shall receive it.

I-A.

The Natural Gas Act Affirmatively and, as a Matter of Constitutional Necessity, Excludes Ultimate Consumers From Its Formula for Regulation and Confirms Its Mechanism Entirely to the Relation Between Pipelines and Utilities. Similarities and Distinctions Between the Natural Gas Act and the Interstate Commerce Act Are Organic and Informative.

Comparison of the Natural Gas Act with the Interstate Commerce Act is useful. Shippers and consignees under the Commerce Act have direct rights under that Act and privity as to rates. They may sue in the courts for violation of the Commerce Act or proceed before the Commission to declare their right to restitution for overcharges or past excessive rates (Secs. 8 and 9).

Since admittedly the Federal Power Commission was given no jurisdiction to award reparation, the only recourse by a pipe line or utility connecting with an originating pipe line, for the exaction of an overcharge illegal under the Natural Gas Act, is by suit in the Courts. That right is limited to the parties to rates which the Power Commission has authority to regulate. No ultimate consumer has any right or standing whatever under the Natural Gas Act to reparations or by suit with respect to any rate the Power Commission may make, since the Federal Power Commission can make no rate whatever to which the ultimate consumer can possibly be a party. That Commission is separated from the consumer by the impassable barrier of local jurisdiction and authority. The Court, on review, can not by indirection or by the terms of a stay order avoid or evade this limitation.

So the fallacy in the statement that the Natural Gas Act was adopted for the benefit of the ultimate consumer is organic and jurisdictional. The contrast in that respect with the shipper-consignee relationship to rail rates under the Commerce Act is striking.

Congress conferred reparations functions on the Interstate Commerce Commission in order to simplify the procedure for redress for direct injuries from excessive rates which are usually small; and large numbers of shippers are frequently represented by shippers associations. *Sharfman, The Interstate Commerce Commission*, Vol. III, B, p. 333 et seq.

No such direct or individual function was intended or supposed to be required in the adoption of the Natural Gas Act, which was aimed at a "handful of holding or transportation companies" making deliveries to a necessarily limited number of local utilities. *Fed. Power Comm. v. Hope Nat. Gas Co.*, 320 U. S. at p. 610.

The proposal to expand any proceeding under the Natural Gas Act either before the Power Commission or on review before the Courts to reach ultimate consumers in vast numbers is an obvious distortion of the "gap-function" between the gas field and the local utility to fill which, alone, the Natural Gas Act was devised. *Hope case, supra.*

Notwithstanding the radically broader theory and the immediate shipper-consignee mechanism of the Commerce Act, the Interstate Commerce Commission never attempted to confuse the distinction between damage awards to those who had paid illegal overcharges and "relief for those who ultimately bear the burden of improper rates." *Sharfman, id.*, p. 339.

Prior to the adoption of the Hepburn Act conferring adequate future rate making power, reparation proceedings had been the unsatisfactory but only stimulus to fair charges. After the Hepburn Act "there was no longer any ground for looking upon the award of reparations *other than as a purely private redress*" *id.*, p. 340; and reparation awards were restricted rigorously to those who could demonstrate actionable and proximate damage, finally resulting in the decision, conclusive of this matter as well, in *So. Pac. Co. v. Darnell-Taenzer Lbr. Co., supra*:

> "the carrier ought not to be allowed to retain this illegal profit, and *the only one who can take it from him* is the one that alone was in relation with him, and from whom the carrier took the sum."

In its Annual Report, 1930, p. 91, the Commerce Commission said:

> "Following the rule laid down by the Supreme Court in Southern Pacific Co. v. Darnell-Taenzer Lumber Company . . . we have declined to go beyond the

parties to the transportation contract in an effort to prove or disprove that the complainant was damaged."

And see full comment on the question as to whether the person who pays the rate ultimately bears its economic burden. *Sharfman, id.*, pp. 346 *et seq.*

In this proceeding, there is no confusion as to which of two parties to a freight shipment (consignor or consignee) should recover the illegal exaction. There is only one party: the pipe line. No ultimate consumer was a party to the rate suspended. By no sort of proceeding before the Federal Power Commission could the ultimate consumer insist that the effect of the rate be passed along.

The factors underlying the reduction of rates chargeable by pipelines (originating or intermediate) to distributing companies are only incidentally or remotely related to the ultimate consumer by the "new look" in rate making established in the Hope Case; and they are no more related to the ultimate consumer of the gas than they are to the general public.

II.

Southern Natural's Independent Right to Restitution of the Overcharges Illegally Exacted Under Protection of the Stay Order Is Not Limited to or by the Terms or Security Provided by That Order or to Any Discretion Held by the Court as to the Distribution of the Stay Fund.

Petitioner is without basis for its effort to limit the vested right of Southern Natural for restitution of the overcharge to a claim merely against the fund or to force Southern Natural into a posture of controversy or competition with ultimate consumers or the general public for

equitable or abstract priority with respect to the fund. See Statement II, ante.

This follows necessarily from the disclaimer, noted above, by Interstate of any equity or claim in the fund or any defense or equity as against the right of Southern Natural to restitution of the overcharge by affirmatively requesting distribution to Southern Natural.

Petitioner confuses the purpose and function of the fund, created solely as a condition to the stay. The stay order was *ex parte* as to Southern Natural. The Court had no jurisdiction to subordinate Southern Natural's vested right to the rate suspended to a controversy with remote aspirants for participation in the fund. The Court of Appeals might, upon a satisfactory showing of indisputable solvency by Interstate, have required no fund and no bond, without thereby impairing Southern Natural's right to restitution. By established—if not universal practice—bonds and funds are required to secure prompt compensation or restitution to those whose vested remedies are suspended or who are otherwise justiciably and proximately damaged by the injunctive order.

It may well be that persons as to whom the inconvenience or damage of the injunction would otherwise be *damnum absque injuria* must look to the terms of the fund or bond, and to its control and administration by the Court where not otherwise given statutory effect, for limitations upon their rights to any recovery (*Greenwood County v. Duke Power Co.*, 147 Fed. [2d] 246); but that consequence is limited to those who complain merely of damages due to the stay order, who otherwise would have no cause of action arising out of the injunction, and not to those who, as here, have a vested, independent cause of action for the recovery of a fixed and obligatory amount with interest. That right survives intact and is fully, though belatedly, actionable on dismissal of the stay.

In imposing conditions for granting a stay the Court might appropriately require a bond to secure the payment of such actionable refund or damages as any party or any *privy to the rate* or even as any other person might proximately and justiciably sustain as a result of the stay; or might in lieu of bond require deposit in Court of the potential overcharge, for the same purpose.

We have stated the reasons for insisting that the Court could not by the terms for granting an injunction indirectly regulate the rates to be paid by ultimate consumers.

Without taking the position that no casus might arise in an injunction proceeding in which it would be proper to take bond or security purporting to create a cause of action in favor of third parties having no damage relation to an act enjoined, provable under our system, and having no right or privity as to any party or the act enjoined or its proximate consequences, we have found no authority for any such condition.

Certainly, the Court would have neither jurisdiction in ordering a stay under the Natural Gas Act nor equitable power to require by *ex parte* order that Southern Natural abandon or impair its right of action against Interstate and look solely to its claims under such bond or to such fund, even if the funds or bonds were adequate and for the sole benefit of Southern Natural.

Such bond or fund might or might not, according to the terms and basis on which it was ordered, constitute additional security protecting Southern Natural's plenary right of recovery against Interstate. It is established that a stay order which has improvidently omitted protection of those immediately damaged by the stay may and should be recast and that any stay fund should be distributed to those having a tangible rather than a wholly speculative equity.

Obviously no power would exist to compel Southern Natural to look solely to a fund created in part for the benefit of some person having no justiciable claim to refund, or to subject its plenary cause of action to the Court's view of the question whether Southern Natural or the ultimate consumer has the better social or moral or economic argument for reimbursement.

In *Brashear Freight Lines v. Comm.*, 41 Fed. Supp. 952, following remand from this Court for the ascertainment of damages resulting from the stay order, the Court declined to limit the state's right to accounting to the amount of the stay bonds which had been taken.

In view of the solvency of Interstate and its uninterrupted liability to Southern Natural for return of the overcharge, the damage or exposure to Southern Natural resulting proximately from the stay would ordinarily be costs of collection, as to which and as to which alone the discretionary administration of the stay fund would operate as a limit of Southern Natural's right to recover that nominal element of damage.

This does not mean that Southern Natural may not, appropriately, insist in this proceeding that the fund should stand and be administered for the prompt and immediate reimbursement of illegal overcharges exacted from it under the protection of the stay order, and should not be exhausted by creating an equity in favor of remote handlers or consumers of gas whose right to have received or retained any part of the reduction is necessarily speculative and cannot, in Southern Natural's area, be determined retroactively by the Court or any authority.

III.

Petitioner Erroneously Maintains That in Order for Southern Natural to Qualify for Distribution From the Sta Fund It Must Meet the Burden of Proving That Southern Natural Has Not Passed on the Overcharge to Others, Precisely as if a Statute Had Been Enacted Equivalent to the Provision to That Effect Adopted as a Condition to the Recovery of the AAA Taxes Declared Illegal.

The position indicated above seems inferable from petitioner's reliance on *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, and *United States v. Jefferson Electric Co.*, 291 U. S. 386, 402-403 (Pet. Br. p. 20), by which petitioner seeks to distinguish or disqualify *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.* and *Adams v. Mills*, cited *supra* and relied on by Southern Natural. The only distinction between those groups pertinent to this matter is that in the tax reclaim cases Congress had affirmatively imposed on the claimant the burden of proving that the tax had not been specifically and effectively passed on.

In the tax refund cases it was deemed practicable for the claimant to earmark the transfer of the tax burden, by specific showing that *it had not been added to the price of the commodity*, or by an equivalent ascertainable certainty. The decisions are noteworthy here, for the Court held, directly or by necessary effect,

—that actions for tax refunds are in the nature of assumpsit (as in the case of other suits for restitution)

—that in that type of case the burden would not rest on a claimant to prove that he has not passed the burden on but for the adoption of the statutory burden of proof (291 U. S., at p. 396). That burden was recog-

nized as "an additional substantive element for recovery" (ib., pp. 397, 400), which must be averred and proven (p. 400).

The court said, in complete refutation of the position of petitioner with repect to the right of recovery, in that admittedly equitable form of action before the statutory provision requiring proof that the burden had not been shifted:

> "If the tax was erroneous and illegal, as is alleged, it must be conceded that under the system then in force there accrued to the taxpayer a right to have it refunded *without any showing as to whether he bore the burden of the tax or shifted it to purchasers*" (291 U. S., at p. 401).

That is precisely the situation here and the case confirms the position of Southern Natural that its claim to restitution, whether by action against Interstate or by claim against the fund, is subject to no equitable defense as a result of the contention of petitioner that Southern Natural should now waive or lose its right to restitution in order not to be in the position of having shifted the illegal exaction and at the same time recovering a refund.

In like manner the other tax restitution case cited by petitioner directly sustains our position, viz.: *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. That case involved the statutory conditions prescribed for recovery of floor-stock taxes invalidated by *U. S. v. Butler*, 297 U. S. 1, to be found in the Revenue Act of June 22, 1936, 49 Stat. 1747, 7 U. S. C., sec. 644. That Act required that claimant show as a condition to recovery of the illegal tax paid by him that he had not shifted the burden of the tax, etc. The court recognized that *U. S. v. Jefferson Elec. Mfg. Co.*, *supra*, had decided the principle, viz., that the statute re-

quiring proof that the tax burden had not been shifted, there sustained, had substantively limited the right to a refund by adopting an added requirement as "an element of the right to a refund" (at p. 349). In short, that shifting the burden in its entirety would not, in an admittedly equitable proceeding, have defeated restitution from the Government itself but for the statute.

The Court also held that its approval of that added substantive statutory requirement was based on the assumption that proof of the facts as to shifting of the burden could be readily made, stating that, if that were not the case, the requirement would violate the Fifth Amendment:

> "When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled" (at p. 352).

In this proceeding there is no such statutory requirement. If there were it is patently impracticable for petitioner, or for any ultimate consumer or for Southern Natural, to make proof in 1949 as to what part, if any, of Southern Natural's net revenue subject to regulation and allocable to the period 1943-1947 could or would have been constitutionally retained by it or would have been required on any rate hearing to be passed on downstream, or what part of any reduction passed on to distributors would have passed through them and reached the ultimate consumers.

Yet petitioner seeks to have that result assumed or synthetically and retrospectively determined by agencies having no jurisdiction to consider it at all. There we have both the impossibility of proof, which this court held to be suffi-

cient to invalidate a specific statutory requirement for a showing as to the shifting of the illegal exaction; added to the absence of any such requirement at all.

This contention of petitioner as to the fancied necessity for disclaiming a shifting of the burden takes on even less tributed to ultimate consumers of that gas the annual "windfall" to Southern Natural over the stay period, after taxes, would amount to less than one-fourth of one percent on Southern Natural's rate base, and that if the reduction on gas purchased by Southern Natural for resale were distributed to ultimate consumers of that gas the annual amount would be 47 cents per consumer per annum.

IV

Petitioner Erroneously Maintains That There Is of Record or in the Proceedings Before Federal Power Commission Some Basis for an Assumption That Southern Natural Could Have Retained no Part of the Benefit of the Gross Rate Reduction Suspended by the Stay Order Had It Not Been Suspended or the Assumption That It Would Have Passed Through to Ultimate Consumers. The Presumption Would Be Contrary to the Public Interest in the Administration of the Natural Gas Act.

There is no basis in this record or in the proceedings before the Federal Power Commission for petitioner's assumption that if the stay had not been granted Southern Natural could have retained no part of the increased gross earnings resulting from the rate reduction suspended by the stay order.

There is no lawful method by which the Federal Power Commission could now conduct an admonitory proceeding to advise the Court.

There is no state commission or authority in Southern Natural's area with jurisdiction to take such action with respect to the utility distributing companies.

The municipal distributors in Southern Natural's area are not subject to regulation unless by recent statute to which our attention has not been directed. *Springfield Gas & Elec. Co. v. Springfield*, 292 Ill. 236; S. C. 257 U. S. 66—and see 18 A. L. R. at p. 946. The absence of mechanism alone is, accordingly, conclusive against an admonitory inquiry either as to Southern Natural or the distributors. No situation similar to *U. S. v. Morgan*, 307 U. S. 183, exists here or can possibly be made available. Hence, the presumption must simply be strong-armed into a conclusion based on the matters largely *dehors* the record argued by petitioner.

It is not believed that any record or proceeding before the Federal Power Commission can be expanded to support a conclusion that a constitutional rate hearing related to the whole or any year of the stay period would have justified the conclusion that the amount of the reduction in the price of Interstate's gas would, unless passed on, have resulted in extortionate return or rates to Southern Natural. We assert that neither in the case of Southern Natural nor in the case of any other natural gas company has the Commission ever handed down or approved a general rate order with any such exactitude, even for rate making purposes, as is argued here on its behalf for a radically different purpose.

Excluding gas purchased for sale direct by Southern Natural to industry consumers and subject to no regulation, the rate reduction in question, less Federal income taxes deducted in accordance with the Commission's rate hearing formula, shows a potential saving to Southern Natural (if refunded) averaging $97,531.00 a year, refer-

able to an average rate base (1944-1947) of $38,808,000 or ¼ of 1%. The argument of petitioner that this potential increase in return would have been constructively extortionate and damnifyingly inequitable is not only unwarranted as a matter of equitable determination but the use of such unattainable exactitude would make unworkable the administration of the Natural Gas Act or its judicial review.

The conferences, the voluntary initiation of rate reductions and adjustments, the demonstrated desire of Southern Natural and many pipelines to cooperate with the Commission in a difficult task which hairsplitting exactitude would make impossible, make it plain that the contention of petitioner here is not only irrational but is not in the public interest.

That contention, moreover, loses sight of the principle of the "zone of reasonableness" in the determination of rates which has made the system of regulation possible, without forcing the Commission to press aggressively for the line of confiscation or the industry to that of extortion. The implied contention of petitioner that an increment of ¼ of 1% in the rate base return of Southern Natural would have been regarded as extortionate and outside of the zone of reasonableness is patently untenable.

In *Ashland Coal & Ice Co. v. United States* (1945), 61 Fed. Supp. 708, 713, Judge Dobie said: "The process of rate-making cannot be solved by the rigid application of algebraic formulae or reduced to the monotonous regularities of mechanical instrumentalities," quoting Mr. Justice Lamar's language in *I. C. C. v. Union Pacific R. R.* (1912), 222 U. S. 541, 550, that "there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer," and Mr. Justice Frankfurter's remark in *Board of Trade*

v. United States (1942), 314 U. S. 534, 548, that "the process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed."

If petitioner's contention were adopted in an effort to obtain a reparation order with respect to intrastate utility rates its extreme position would be met by the settled recognition of a zone of reasonableness in the maintenance of rates:

U. S. v. Illinois Cent. R. R. (1924), 263 U. S. 515, 522;

Texas & Pacific Ry. Co. v. U. S. (1933), 289 U. S. 627, 636;

U. S. v. Chicago, M., St. P. & P. R. Co. (1935), 294 U. S. 499, 506;

Georgia ex Pennsylvania R. R. Co. (1945), 324 U. S. 439, 460-461;

New York v. United States (1947), 331 U. S. 284, 344-345.

This Court has long held that the authority to award reparations is based upon the power to prevent *extortionate* rates or other *arbitrary* action:

Lake Shore & M. S. Railway v. Smith (1899), 173 U. S. 684, 698;

Portland Ry. L. & P. Co. v. R. R. Comm. (1913), 229 U. S. 397, 410.

The inaptness of the contention of exactitude and its relatively insignificant results to Southern Natural and *de minimis* bearing on the ultimate consumer in the great equation of the public service involved is further emphasized by the heavy and continuous investment which is indispensable to the public welfare.

Southern Natural's net rate base has increased during the last four years from $36,671,000 to an estimated $60,-

000,000 at the end of 1948, limited to that amount largely by scarcity of essential material.

That would not be possible on the policy of confiscatory exactitude and rat-hole alertness for legalistic return urged as obligatory, of all possible factors, by petitioner.

V.

Petitioner's Contention That Southern Natural Earned Without Respect to the Rate Reduction During the Entire Period of the Stay the Maximum Amount Which Would Have Been Permitted in a Rate Hearing Is Not Only an Unwarranted Assumption in Gross (Supra), But Ignores the Fact That Southern Natural Sold a Large Volume of Gas to Industries for Consumption at Private Contract Rates Not Subject to Regulation or Control by Federal Power Commission or Any State Authority and Known Generally to Reflect a Low Margin of Return.

The facts as to Southern Natural's private contract status as to its material sales of this gas direct to industry consumers are summarized in Par. V of the Statement and Summary *ante*).

There is, of course, no jurisdiction in the Federal Power Commission over these sales, which are in Southern Natural's area influenced or compelled by well recognized economic and competitive conditions. See *ante*. By taking a continuous volume during summer months and by reason of their load factor, and due to the location of the principal consumers of this type literally on the coal measures in the Birmingham District, it is a matter of general knowledge that they take a low rate and even if the deliveries to industries were subject to regulation it is not conceivable that the contracts would have been disturbed during the stay period, with the OPA mine price of a repre-

sentative steam coal in the Alabama field increasing 60% in the period January 1, 1943, to November, 1946, and the commodity and wage index of natural gas operation notoriously expanding. It is to be noted that in the consent distribution undertaken by the Court in the Natural Gas Pipeline Case, analyzed in the Appendix because of its typical illustration of the administrative complexity and arbitrary function in the process urged by petitioner as a fixed rule, the Court, in taking upon itself the determination of what groups among ultimate consumers were eligible for the distribution; excluded industrial and home-heating loads, as being commonly recognized to be sold at low rates; competitive with other fuel and carrying wide disparities in rates approved by regulatory commissions: *Natural Gas Pipeline Co. v. F. P. C.*, 131 Fed. (2) 137.

We find no evidence that petitioner gives any weight in its argument for a rigid "ultimate consumer" formula to the fact that this material industrial load is a matter of private contract, beyond the jurisdiction of the commission. The fund in court awaiting distribution reflects an amount equal to the overcharge on that load. Its distribution to "ultimate consumers" in the stream of regulation would be gratuitous and arbitrary.

VI.

The Proposal of Petitioner That the Court Submit the Question of Fair Return to Southern Natural for the Period 1943-1947 for Advisory Opinion by the Federal Power Commission or State Commissions Is Untenable, for Lack of Authority in Such Agencies and Because, of the Total Inaptness of the Proposal to Graft That Mechanism on the Courts of Appeal.

No purchasers from Southern Natural, either industry or distributor, municipal or otherwise, intervened or ap-

peared in the court below; nor did any State commission or municipal authority in Southern Natural's area, although circularized by petitioner.

No state authority in that area has indicated any intention or desire to engage in any admonitory hearing to advise the Court of Appeals, the objective of which is to declare Southern Natural's position synthetically inequitable and distribute 47 cents a year to ultimate consumers.

No state authority in that area has any jurisdiction to that end, known to counsel for Southern Natural, if it could be otherwise interested in that undertaking. The facts as to this matter and petitioner's offer to aid the Court (Br. p. 33) and the total lack of any similarity to the proceeding pending before the Secretary in *U. S. v. Morgan, supra*, have been noted in Par. VI, Statement and Summary, *ante*.

There are approximately twenty (20) distributing companies or agencies involved in the proposal to allot the fund to the ultimate consumer in addition to the pipeline purchasers, or some twenty-four (24) in all (R. 30). All of these are proposed to be subjected to retroactive fair return examination. The Memphis municipal authority alleges in its petition that it is not subject to regulatory control. That is true generally of municipal distributors, *Springfield Gas & Elec. Co. v. Springfield*, 292 Ill. 236, S. C., 257 U. S. 66, and see 18 *A. L. R.*, at p. 946.

It may be that the Illinois Commission has jurisdiction to award reparation (*Illinois-Natural Gas Pipeline Case*, 141 Fed. [2d] at p. 30).

It is impossible to conceive of the grafting of any such multiple, unnecessary and unsanctioned mechanism upon the Courts of Appeal.

VII.

The Contention by Petitioner for Distribution of the Stay Fund to Ultimate Consumers By-Passes the Downstream Distributors and Municipalities Which Purchased Gas From Southern Natural and Is Based Upon a Wholly Unwarranted Assumption That These Distributors Would Have Been Compelled to Pass the Full Reduction on to Consumers, if It Had Been Compulsorily Made Available by Southern Natural to the Distributors.

The facts as to non-concurrence by any known distributor in Southern Natural's area in the proposal of petitioner have been stated in paragraph VII of the Statement and Summary, *ante*. The assumption that the intermediate distributors should be by-passed is subject to precisely the argument opposing the by-passing of Southern Natural.

The sole basis of the argument of petitioner is the arbitrary assertion (Pet. Br., pp. 21-25) that "the ultimate consumers are equitably entitled to the fund." That argument is constructed upon a series of unsupported assumptions the more outstanding of which may be noted.

> "The purchasers for resale of the natural gas . . . suffer no monetary loss as a result of the stay" (p. 22).

That statement, made in the face of Southern Natural's payment of $682,000 in illegal exactions, is sought to be supported by a series of hypotheses such as the assertion that the purchasers may be presumed to have earned a fair return anyhow, *since they did not seek approval of rate increases*.

That assumption is unrealistic and, as we have pointed out, it is contrary to administrative cooperation and

comity. It ignores the delay and difficulties of a full dress rate proceeding. The timing of such a controversy is dependent upon many factors, including business forecasts and the extent to which earnings are considered to fall below a surviving return, as well as (in the case of Southern Natural) the earnings from non-regulated sales. The argument is, however, academic here. As to Southern Natural, the fallacy is the assumption that it has sustained no monetary loss if it earned a "fair return" in spite of the disbursement of money which it was under no legal obligation to expend and had a Fifth Amendment right to retain as against Interstate.

That notion of petitioners apparently rests upon the further assumption that a "fair return" is capable of translation into an exact sum of money, reflected in the *status quo*. Any earnings above that vicarious but absolute "fair return" are "an unmerited windfall" (p. 23). It might be thought "monetary loss", accordingly, must apparently be determined by some coincidental but exact "standard" which not only has never received legislative or judicial sanction but so far as counsel are advised has never before been suggested in the formula here urged by petitioner even in a Law Review.

It is a novel suggestion to be made to the Courts of Appeal that they delegate to Federal and State Commissions with respect to long past transactions the function of exercising the court's judicial discretion, accompanied by notice that the administrative agency proposes to ignore the zone of reasonableness principle and to apply the presumption of maximum return based on the pipelines cooperative hesitation to precipitate full dress rate litigations.

The statement of the brief (p. 24) that "the court, in staying the Commission order, prevented the transmission of these benefits to the ultimate consumers" indicates the

scope and purpose of the application for the writ, viz., not so much the correction of any inadvertence in the Central States case as to graft on the Courts of Appeal a rigid "ultimate consumer" formula based on untenable assumptions.

VIII.

The Average Overcharge Proposed to Be Allocated From the Fund to Commercial and Domestic Consumers in Southern Natural's Area Amounts to $2 Per Customer for the Entire 4½ Years or at the Average Rate of 47¢ a Year Per Customer. That Result Is Inadequate to Warrant Consideration Being Given to the Overruling of Established Precedents and the Imposition on the Courts of Appeal of the Rigid Rule Sought by Petitioner. No Distributor, State Authority or Consumer in Southern Natural's Area Has Responded to Petitioner's Invitation to Participate in This Proceeding for Any Such Minimal Result.

Par. VIII (Statement and Summary) states the facts as to the average distribution to ultimate consumers in Southern Natural's area contemplated by petitioner's formula, viz., approximately 47 cents a year, or a total of $2.00. The total fund deposited in court through September, 1947, is asserted to be $2,444,573, with some $320,000 more not impounded (Pet. Br. p. 5). About $1,000,000 of this potential total of $2,764,573 is referable to direct sales to industries, presumptively under private contract over which no state commission appears, as yet, to have asserted or successfully established jurisdiction. The amount, accordingly, apparently available for distribution on the assumption of pipeline and distributor inequity and ultimate consumer equity is approximately $1,764,573, which distributed to some 700,000 estimated meters in the total area would amount to a total of $2.52 for the 4¼ years, or about $.59 a year.

If the pipelines and distributors were to be properly characterized as conclusively guilty of extortion or inordinate returns and had no Fifth Amendment right to restitution, whether they had shifted the burden of the overcharge or not, there is obviously no such extortionate windfall to them in terms of net percentage return on their rate base, to provoke the indignation indicated in petitioner's brief and no such theoretical loss or recompense to ultimate consumers to justify involving the Court of Appeals in the complications, hearings and hunches of petitioner's formula.

IX.

The Mechanical and Administrative Functions Involved in the Insistence of Petitioner Are Inconsistent With the Jurisdiction and Unsuited to the Organization and Functions of the Courts of Appeal. The History of Refunds in Similar Cases Made Pursuant to Consent Demonstrates the Lack of Judicial Standards, the Complexity and the Burden Upon the Organization and Functions of the Court Which Would Result From the Adoption of the Rule Proposed by Petitioner.

It is an axiom that where a court has inadvertently or otherwise given effect to a manifest and substantial injustice and it is within the court's power to redress the injury, mechanical difficulties and the saving of trouble would not justify the failure to make restitution. Here we have no such situation. The chance (and not any assurance whatever) of securing a rate reduction has been shown to be limited to a total average over 4¼ years of approximately $2.00—even less (net) to commercial users who saved taxes by the expenditure. The history of the consumer distributions, involving the long periods necessary to the initial and exploratory Natural Gas Act hearings and interpretations, shows that even in those protracted, precedent

making hearings, the amounts distributable to ultimate consumers have been *de minimis*.

It is the rule of the common law that damages from an injunction, where the suit is not maliciously instituted, are *damnum absque injuria*, resulting in the common and statutory practice of requiring bonds or funds. It would be futile to attempt to overcome the common-law rule, predicated on the confidence that the Courts will take full consideration of all private and public interests before granting a stay, by guaranteeing against even remote and consequential damages.

No one can question the *bona fide* purpose or the important questions involved in the Interstate proceeding or the absence of left-hand motives of which petitioner expressed apprehension or the absence of any molecular possibility of the abuse of the circumstance of affiliation.

That argument too closely parallels the untenable presumptions of exactitude and incitation to litigiousness underlying the argument for the presumption of extortion.

In view of the per capita results to the ultimate consumer it is fair to state that petitioner is not so much concerned over getting 47 cents a year to ultimate consumers in Southern Natural area as if is interested in preventing that respondent and the other pipelines from obtaining restitution in a lump sum of the overcharges which they paid.

The important, frequently or generally constitutional issues presented in these hearings sanctioned by Congress with full knowledge of their institution and progress should not be handicapped or blocked by inapt mechanism or unwarranted assumptions, on the assumption that the courts will not at the outset or by modification as the litigation proceeds take care that the public interest as well as that of parties is not unduly jeopardized.

Greenwood County v. Duke Power Company, 107 Fed. (2d) 484, affords a conclusive statement of these reasons why artificial rules of restitution should not be engrafted on the established procedure and rules of accountability, particularly in cases, such as here, involving the exercise for powers with respect to which the opinion of able and conscientious lawyers and judges is divided (Ib., at p. 488).

So much for the weakness of the general position of petitioner for an arbitrary "ultimate consumer" presumption and formula. When consideration is given to the mechanism proposed by petitioner to be grafted on the judicial process, the glaring inaptness of the suggestion becomes manifest. First, there is the proposal for admonitory hearings by all commissions, willing or unwilling, authorized or unauthorized, here involving petitioner and the commissions from some eight states. Second, and mainly, the mechanism for distributing trifling amounts to hundreds of thousands of ultimate consumers.

We set forth in the appendix a summary analysis of the distribution (by consent) to consumers in the Natural Gas Pipeline Refund by the Seventh Circuit and of the distribution as finally ordered in the case of the Panhandle Eastern Fund, a survey of which sufficiently indicates that the procedure followed, without prejudice to the rights of any person having a justiciable interest, in the Central States case was provident, followed traditional principles and should not be displaced by the rigid presumptions and anomalous complex, mechanism proposed by petitioner.

The Eighth Circuit in the matter of the Panhandle Eastern Fund (154 Fed. [2d] 909) directed return of the fund to those immediately and primarily entitled (in that case distributing companies) for adjustment by them with ultimate claimants in accordance with State law. Sub-

stantially the same procedure was indicated by the Supreme Court in the *Central States case*, with an interval of delay.

In the case of *Panhandle Eastern v. Fed. Power Comm.*, 324 U. S. 635 (143 Fed. [2d] 488), certain of the distributing companies entitled to the refund disclaimed in favor of their consumers, but the Eighth Circuit did not in its final order undertake to make redistribution to consumers. It left the question of ultimate liability where it belonged, if it belonged anywhere—with the distributors who received refunds, as might be established under state law or by voluntary action.

In that proceeding the stay order had provided for the impounding "for the benefit of the ultimate consumers or of petitioners" (Panhandle and affiliated distributors) "as in this litigation may be determined entitled thereto." See original stay order, entered December 7, 1942, set out in 154 Fed. (2d) 909. Sections 1, 2 and 4 of that order, reflecting the extra-legal position of the Commission, improvidently contemplated that if the reduced rates were sustained, distribution would be to ultimate consumers. The fund reflected overcharges "collected by Panhandle from distribution companies. Most of these distributors * * * have disclaimed any interest in the funds impounded and have agreed that so much of the funds as was derived from the sale of gas to them by Panhandle belongs to their customers." 154 Fed. (2d), at p. 910.

The order for distribution as actually entered by the 8th Circuit retreated from this broad suggestion and the comment quoted can not be regarded as a precedent (154 Fed. [2d] 910). Judge Riddick's dissenting view clearly prevailed in the final opinion for distribution.

X.

The Functions Proposed by Petitioner Are Those of Rate Making in Violation of the Basis of and Undeviating Adherence to the Doctrine of Primary Jurisdiction.

It seems to us incontestable that petitioner is attempting to require the Court of Appeals to involve its process in an anomalous series of rate hearings. On page 26, although conceding that if the presumptions tendered by petitioner are not accepted, the reasonableness of the rates of the pipelines during the stay period became a factory for decision, petitioner argues that the Court should undertake the task as an "ancillary" function.

The argument ignores the intensely practical reasons underlying the doctrine of primary jurisdiction, as well as the necessary consequences of any scheme of rate regulation.

It adds nothing to the argument to characterize the reparation function here advocated as "judicial" in its nature. Mr. Justice Brandeis long ago disposed of that kind of argument:

> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometime this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the funcion, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary

resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." Great Northern Ry. Co. v. Merchants El. Co. (1922), 259 U. S. 285, 291.

XI.

Inasmuch as the Right of Southern Natural to Restitution From Interstate Is Incontestable for the Lack of Any Off-setting Equity as Between Interstate and Petitioner, the Proposal of Petitioner for Distribution to Ultimate Consumers Having a Molecular Interest in the Fund Would Expose Interstate to a Heavy Penalty of Which It Was Not Adequately Apprised by the Terms of the Stay Order.

By accepting the terms of the stay order as the condition to the stay, Interstate necessarily took the chance, if any, that it might be compelled to make restitution of the overcharge to those who paid it, there being no possible off-setting equity as between Interstate and its pipeline vendees, and at the same time having to suffer distribution to ultimate consumers of the stay fund paid into Court by Interstate out of its free assets. It is not the function of Southern Natural to argue that *casus*; other than to point out to the Court (a) that Southern Natural has not expressly or impliedly consented, as all vendee pipelines appear to have consented in the Central States case, to look to the fund there voluntarily paid into Court by Natural Gas Pipeline in discharge of its bond; and (b) that in the

exercise of the Court's discretion as to the distribution of the fund the equity of Interstate with a stake of $2,500,000 and the prodigious cost of distribution as against a synthetic, assumed and provable equity of ultimate consumers to a total distribution of $2.00 per capita would not seem to present a difficult problem.

Conclusion.

The objective of petitioner is not to overrule any novel conclusion or departure in the Central States case, but to graft on the traditional equitable powers and duties exercised by the Courts of Appeal in review proceedings under the Natural Gas Act a rigid, administrative, automic and non-judicial formula which can be properly described as being by Robin Hood, out of Rube Goldberg.

The procedure giving rise to the imaginary evil fancied by petitioner has been within the knowledge of Congress, session after session, without suggestion of amendment from any source, including petitioner.

The formula proposed in this proceeding is frankly predicated on doubt whether Congress is competent to deal with the imaginary *casus* or the Courts can be trusted for the provident exercise of their judicial functions.

The formula proposed is unsound and unnecessary; and it is submitted that the petition for writ, instead of being limited to the Central States case should have been directed at the line of established precedents cited above; and should be dismissed.

Respectfully submitted,

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APPENDIX.

Analysis of the Natural Gas Pipeline Refund.

(128 Fed. [2d] 481, 129 Fed. [2d] 515, 131 Fed. [2d] 137, 134 Fed. [2d] 265, 141 Fed. [2d] 27, 324 U. S. 138.)

Analysis of the proceeding in the matter of the Natural Gas Pipe Line Fund demonstrates the confusion, lost motion and administrative detail involved in the effort to rationalize the "ultimate consumer" theory, even where those who have paid the overcharge consent that distribution may be passed along.

The above noted formal hearings and opinions reflect only a part of the controversy over consumer distribution, in that matter.

In the Natural Gas Pipe Line controversy, Natural Gas gave bonds, in connection with a temporary stay order and temporary injunction, "to secure *the refund to purchasers at wholesale* of the amounts respectively due them if the court should sustain the reduction of rates ordered"—324 U. S. at p. 140. That penalty was the conventional and appropriate condition for stay, whether required by a bond or a fund. The bonds made no reference to ultimate consumers, and on the appeal on which the rate reduction order was finally sustained, Natural Gas Pipe Line suggested the theory that since ultimate consumers (for whose benefit it urged the Natural Gas Act was adopted) could not get the refund through retroactive rate regulation of the distributors who would realize the refunds, since the refunds would relate to past business, the wholesale customers covered by the bond should not get the refund. The Court declined to consider the ultimate consumer suggestion (Fed. Power Com. v. Natural Gas Pipeline, 315 U. S. 575, at p. 598). Thereupon various ultimate consumers brought suits against Natural Gas. The latter

then petitioned the Court to take jurisdiction of the entire matter of refund and to determine its full liability both on the bonds and by reason of the stay. This the 7th Circuit did, reciting that petitioner (Natural Gas), its customers (the distributing companies), the Federal Power Commission, the Illinois Commerce Commission and those filing the independent suits were all in substantial accord to the effect that the excess charges *ought to be "refunded"* to the ultimate consumers. *Natural Gas Pipeline Co. v. Fed. Pow. Comm.*, 128 Fed. (2d) 481. Notwithstanding the 7th Circuit's recital that all of these companies who had been compelled to pay the excess rate had agreed that distribution should go to ultimate consumers, Central States Electric responded to the 7th Circuit's opinion of May 22, 1942, which took comprehensive jurisdiction over the entire fund, by writing the Clerk on June 29, 1942, claiming the excess paid by it. As of the following day the 7th Circuit rendered its opinion that the ultimate consumers were entitled (June 30, 1942, 129 Fed. 2d 515; 324 U. S. at p. 141).

On July 1, 1942 Natural Gas Pipeline paid into Court the excess (324 U. S. 141) amounting to $6,377,913.52 (131 Fed. [2d] 138) and on September 2, 1942, the Court issued its show-cause order for distribution of the entire fund to elaborately analyzed "eligible consumers," excluding those who burned gas industrially or commercially or for the purpose of heating, according to no known or conceivable principle (except, presumably, that the Court would not have extended the reduction to those classifications if it were a rate making authority with jurisdiction to readjust the utilities' rates).

Other distributions to customers of impounded stay funds, *made with the consent of the distributing companies who paid the overcharges*, have been on a much less laborious and arbitrary basis, as demonstrated in this

proceeding in the case of the Louisiana utilities. That simplification is necessarily based on consent.

The point is that in the absence of consent any formula for diversion of the refund from those who paid the overcharges and for its distribution to ultimate consumers not in privity as to the rate or the overcharge, is arbitrary and beyond the jurisdiction or judicial discretion of the court.

Examination of the opinions in 128 Fed. (2d) 481, in 129 Fed. (2d) 515, and in 131 Fed. (2d) 137, will disclose that the 7th Circuit attached significance to the Federal Power Commission's conclusion that distribution of overcharges should be made to consumers. And the cost and continued confusion of this procedure is further demonstrated by still another opinion in the case (134 Fed. [2d] 265) in which the Court finds itself confronted with the necessity, not of adjudicating a legal or equitable claim, but of considering the tax consequences of various alternatives. In that opinion the court restated the fallacy which the Supreme Court could not follow, viz., that "the proceedings which were instituted by Federal Power Commission * * * to reduce the natural gas cost to the utilities were for the benefit of the consumers * * *. most of the utilities have steadfastly disclaimed any right to or interest in the refund. They realize that the proceedings were for the benefit of the consumers * * *. An exception is the Nebraska City utility * * * It entertains the old and outmoded conception of utility magnates and utility counsel which overlooked the trustee status of a public utility," etc., etc.

Not being enabled to use the consent formula in the case of the non-consenting utility, the Court after further unhappy steps (324 U. S., p. 142) turned the amount of the latter's overcharges over to the various municipalities, without prejudice to the utility's "making claim of ad-

justment." This was the 7th Circuit's disposition of the matter, with which the Supreme Court could not agree.

That proceeding is a classic illustration of the lack of realism in allowing Natural Gas Pipeline to use the Court to deal with a fund which was a function of the distributors who were entitled to it.

The Panhandle Eastern Fund (Eighth Circuit.)

The Eighth Circuit in the Matter of the Panhandle Eastern Fund (154 Fed. [2d] 909), directed return of the fund to those immediately and primarily entitled (in that case distributing companies) for adjustment by them with ultimate claimants in accordance with state law. Substantially the same procedure was indicated by the Supreme Court in the Central States Case, with an interval of delay.

In the case of *Panhandle Eastern v. Fed. Power Comm.*, 324 U. S. 635 (143 Fed. [2d] 488), certain of the distributing companies entitled to the refund disclaimed in favor of their consumers, but the Eighth Circuit did not in its final order undertake to make redistribution to consumers. It left the question of ultimate liability where it belonged, if it belonged anywhere—with the distributors, who received refunds as might be established under state law or by voluntary action.

In that proceeding the stay order had provided for the impounding "for the benefit of the ultimate consumers or of petitioners" (Panhandle and affiliated distributors) "as in this litigation may be determined entitled thereto." See original stay order entered December 7, 1942, set out in 154 Fed. (2d) 909. Sections 1, 2 and 4 of that order improvidently contemplated that if the reduced rates were sustained, distribution would be to ultimate consumers. The fund reflected overcharges "collected by Panhandle

from distribution companies. Most of these distributors * * * have disclaimed any interest in the funds impounded and have agreed that so much of the funds as was derived from the sale of gas to them by Panhandle belongs to their customers." 154 Fed. (2d), at p. 910.

In the *Panhandle Case* the court issued an order to show cause as to distribution (Dec. 12, 1945). Panhandle asked to be relieved of the expense of distribution to ultimate consumers of $25,000,000 fund. This expense was estimated at more than a $1,000,000. The 8th Circuit (majority opinion) stated that when the stay order was granted on condition that Panhandle pay the expense of distribution, Panhandle "neither objected to the conditions nor sought review of the Court's action in impounding them, but under the interlocutory injunction enjoyed for three years the suspension * * * of the Commission's order."

The 8th Circuit considered that it had the right to condition the stay on such terms as would protect "all—including the public—whose interests the injunction might affect," on the supposed authority of the Morgan Case, 307 U. S. 1211.

The Supreme Court does not agree to this effect of the Morgan Case (Central States Case) and it seems clear that the function of an injunction bond (or stay fund) is to protect those who would suffer proximate and justiciable damage from the stay.

There are observations in the majority opinion of the 8th Circuit [154 Fed. (2d), at page 911, sub-div. (1)] which indicate that the Court considered that it could waive or impose liability on Panhandle for interest on payments into the fund. So far as the fund is concerned (which has no proper function save as security it doubtless could—and certainly it could limit interest so far as the order gratuitously ran for the benefit of the general

public or ultimate consumers having no vested rights but no such discretion as to the fund, or interest on the fund, could impair the independent right of those who are entitled to restitution both as to principal and interest.

Opinion Authorizing Order Entered October 8, 1946.

United States Circuit Court of Appeals,
Eighth Circuit.

No. 12,466.

Panhandle Eastern Pipe Line Company, a corporation, Illinois Natural Gas Company, a corporation, and Michigan Gas Transmission Corporation, a corporation,
Petitioners,

vs.

Federal Power Commission, City of Detroit, Michigan, County of Wayne, Michigan, Michigan Consolidated Gas Company, a corporation, and Michigan Public Service Commission,
Respondents.

Before Sanborn, Woodrough and Riddick, Circuit Judges.

Per Curiam.

This Court has been confronted with a conflict of views relative to the disposition of so much of the fund impounded under the stay order of December 7, 1942, as is claimed by distributors. Those who have spoken in the interests of the ultimate consumers have urged this Court to retain that part of the fund in question until the distributors who claim it have established their alleged exclusive rights in state courts of competent jurisdiction. Those representing the distributors contend, in reliance upon the case of Central States Electric Co. v. City of Muscatine,

324 U. S. 138, that so much of the fund as is allocated to the claiming distributors, should be turned over to them without further delay and without the imposition of any burdensome conditions.

The stay order of December 7, 1942, which established the impounded fund, provided that the fund should be held "for the benefit of the ultimate consumers or of petitioners (Panhandle Eastern Pipe Line Company) as in this litigation may be determined entitled thereto." The litigation involved the validity of an order of the Federal Power Commission reducing the wholesale rates being charged by Panhandle for gas sold by it to distributors which was resold by them at retail to ultimate consumers. The order of the Commission did not purport to affect retail rates charged by the distributors. No ultimate consumer and no distributor now claiming the right to participate in the fund was, at the time the stay order was entered by this Court, a party to the litigation. As to all who were not parties, the stay order was an *ex parte* order made to preserve the status quo and to indemnify those who would be injured by the stay of the rate reduction order of the Federal Power Commission if that order was ultimately held to be valid.

While, at the time the stay was granted, this Court evidently assumed that it would be the customers of the distributors who would be injured by the granting of the stay, the Court did not and could not then adjudicate or declare that the fund should belong and be distributable solely to ultimate consumers or to Panhandle. The Court was not attempting, at the time the stay order was entered, to determine who might ultimately be entitled to the fund impounded, nor was it attempting to cut off or affect the legal or equitable rights, in the fund, of those not parties to the litigation. The question before the Court then was

whether the application of Panhandle for a stay of the order of the Commission should be granted, and, if so, what terms and conditions should be imposed upon Panhandle in connection with granting the stay applied for.

From a strict legal standpoint, the fund is made up solely of overcharges in wholesale rates collected by Panhandle from distributors which were required to pay the unreduced wholesale rates during the impounding period. The ultimate consumers of gas furnished by Panhandle to distributors have been prejudiced by the stay order only to the extent that the rates which they paid distributors for the gas during the impounding period exceeded the rates which the consumers would have paid had no stay order been entered. The equities of consumers, therefore, depend upon whether they would have paid less for gas during the impounding period if the reduction in wholesale rates ordered by the Federal Power Commission had become effective in accordance with the terms of the rate reduction order. The distributors which have filed disclaimers of any interest in the impounded fund have, in effect, conceded that, but for the stay order, the reduction in wholesale rates ordered by the Federal Power Commission would have been passed on by such distributors to their customers, and that these customers are therefore exclusively entitled to so much of the impounded fund as was contributed by the disclaiming distributors.

Whether the customers of a distributor which is claiming the exclusive right to a refund of the overcharges paid by it are entitled to have or to share in the contribution which that distributor made to the fund is, under the ruling of the Supreme Court in the Central States Electric Co. case, supra, a question of state law to be determined by the courts of the state. We think that, *prima facie*, the contribution of such a distributor is returnable to it.

Our conclusion is that it will be to the advantage of all those who are interested in that portion of the impounded fund which is claimed by distributors to turn it over to such claimants upon terms and conditions which will protect the rights, if any, of ultimate consumers and will enable them to enforce such rights as they may have against the distributors, in the state courts. These distributors are solvent and the funds in their possession will be as accessible to persons claiming superior rights as the funds would be if retained by this Court. The amount contributed by each such distributor has been definitely ascertained and is not in dispute. Interest on the amounts will not be allowed, since the funds impounded have been invested at less than one per cent interest and this Court has ordered that the earnings of the impounded fund be applied to expenses of distribution.

Appropriate orders will be entered to effectuate the conclusions reached.